

**UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA**

AMADOU LAMINE DIOUF,

Petitioner,

v.

MICHAEL B. MUKASEY, et al.,

Respondents.

NO. CV 06-7452 TJH (FMO)

**ORDER ADOPTING FINDINGS,
CONCLUSIONS AND RECOMMENDATIONS
OF UNITED STATES MAGISTRATE JUDGE**

INTRODUCTION

On November 21, 2006, petitioner, through counsel, filed a Petition for Writ of Habeas Corpus by a Person in Federal Custody ("Petition"), pursuant to 28 U.S.C. § 2241. Petitioner challenges his detention by the Bureau of Immigration and Customs Enforcement of the Department of Homeland Security ("ICE") for nearly two years while removal proceedings have been pending against him. On February 28, 2007, respondents filed a Return to the Petition ("Return"). Petitioner filed a Traverse and Reply to the Return ("Reply") on March 29, 2007. On May 18, 2007, petitioner filed a Supplemental Memorandum of Points and Authorities in Support of the Petition ("Supp. Mem."). On August 22, 2007, petitioner filed a Supplemental Authority in Support of the Petition. Oral argument was heard on December 5, 2007. On December 7, 2007, petitioner filed a Supplemental Memorandum Regarding Additional Legal Authority.

On December 19, 2007, the Magistrate Judge issued his Report and Recommendation ("R&R"), recommending that the Petition be granted. (R&R at 2 & 20). On January 4, 2008, petitioner filed an "Objection to the Report and Recommendation of United States Magistrate

Judge" ("Pet.'s Objection"). On January 14, 2008, the government filed its "Objections to Report and Recommendation" ("Govt.'s Objections").

DISCUSSION

The Court has considered the government's Objections and finds them to be unpersuasive. It appears that some of the government's Objections mischaracterize the Magistrate Judge's R&R. For example, the government argues that "[t]he [R&R] incorrectly concludes that '[l]ike the petitioner in Nadarajah, petitioner has been detained for nearly two years' Nadarajah was detained for five years[']" (Govt.'s Objections at 9) (internal citation omitted). When the portion of the R&R the government cited is read in context of the entire paragraph, however, it is clear that the comparison made between petitioner's case and that of the petitioner in Nadarajah was not that they were both held for the same period of time, but rather, that both petitioners were held for periods that greatly exceed the six-month period that has been held to be presumptively reasonable under the general detention statutes. (See R&R at 13) ("Under Nadarajah, petitioner's continued prolonged detention is not authorized by the statute under which he is detained. Like the petitioner in Nadarajah, petitioner has been detained for nearly two years, almost four times longer than the six-month period described by the Ninth Circuit as presumptively reasonable under the general immigration detention statutes."); see also Zadvydas v. Davis, 533 U.S. 678, 701, 121 S.Ct. 2491, 2505 (2001) (a post-removal detention period of less than six months is presumptively reasonable and thereafter, the alien must be released if there is no significant likelihood of removal in the reasonably foreseeable future); Nadarajah v. Gonzales, 443 F.3d 1069, 1080-81 & n. 4 (9th Cir. 2006) (a "brief" detention of no more than six months is presumptively reasonable for aliens detained under § 1226(c)).

In addition, the government maintains that the R&R "erred by not acknowledging" that the filing of a petition for review results in the entry of an automatic stay of removal. (See Govt.'s Objections at 4-5). The portion of the R&R cited by the government in support of this contention, however, is not referring to the automatic stay that is entered upon the filing of a petition for review. Rather, the R&R clearly states that the Ninth Circuit's grant of a motion to stay is not

1 automatic and cites to the Ninth Circuit's Order wherein it granted petitioner's motion to stay. (See
 2 R&R at 15-16 & n. 9).

3 Finally, regarding petitioner's Objection, petitioner submitted new evidence that was not
 4 submitted to the Magistrate Judge, which indicates that petitioner was convicted of possession
 5 of less than 30 grams of marijuana. (See Pet.'s Objection, Exh. 16). A district court has
 6 discretion to consider evidence offered for the first time in a party's objections to a magistrate
 7 judge's proposed findings and recommendations. Brown v. Roe, 279 F.3d 742, 744 (9th Cir.
 8 2002); United States v. Howell, 231 F.3d 615, 621 (9th Cir. 2000), cert. denied, 534 U.S. 831, 122
 9 S.Ct. 76 (2001) ("[A] district court has discretion, but is not required, to consider evidence
 10 presented for the first time in a party's objection to a magistrate judge's recommendation.").
 11 Under the circumstances, the Court will exercise its discretion to consider this new evidence.
 12 Accordingly, the Court adopts the R&R with the understanding that petitioner's detention is
 13 governed by 8 U.S.C. § 1226(a).

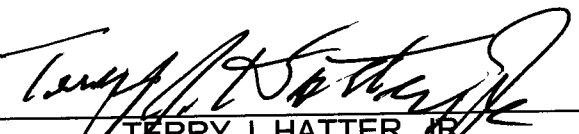
14 CONCLUSION

15 Based on the foregoing and pursuant to 28 U.S.C. § 636, the Court has reviewed the
 16 Petition, all of the records herein, the Report and Recommendation of the United States
 17 Magistrate Judge, and the Objections to the Report and Recommendation. The Court has made
 18 a de novo determination of the portions of the Report and Recommendation to which Objections
 19 were directed. The Court concurs with and adopts the findings and conclusions of the Magistrate
 20 Judge with the understanding that petitioner's detention is governed by 8 U.S.C. § 1226(a).
 21 Accordingly, IT IS ORDERED THAT:

22 1. Judgment shall be entered granting the Petition and ordering petitioner released on
 23 the conditions already imposed by the Immigration Judge's Order dated February 9, 2007.

24 2. The Clerk shall serve copies of this Order and the Judgment herein on the parties.

25 DATED: 2/6, 2008.

26
 27 
 28 TERRY J. HATTER, JR.
 UNITED STATES DISTRICT JUDGE